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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 89.

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

v.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchinson, Deceased.

PETITIONER'S REPLY BRIEF.

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OCTOBER TERM, 1949.

No. 897.

EASTERN STEAMSHIP LINES, INC.,
Petitioner,

v.

FRANCIS J. MULLIGAN, as Public Administrator of the Goods, Chattels and Credits of James Brodie Hutchinson, Deceased.

PETITIONER'S REPLY BRIEF.

The basic issue in this case is whether a ship's husband or general agent for the shoreside business of a government-operated vessel is liable to a civil-service employee of the United States, serving as a seaman on the vessel, for the failure of the Government to supply him with a safe place to work as a result of the negligence of fellow civil-service crew members. This Court in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. ....., following *Caldarola* v. *Eckert*, 332 U. S. 155, and overruling *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, held such general agents not to be so liable. That decision is controlling here.

Established principles thus require the grant of the petition herein accompanied by an immediate remand of the case for further proceedings by the district court in accordance with the opinion announced in the *McAllister*

case. To escape this normal impact of *McAllister*, respondent advances in this Court for the first time the novel contention that petitioner, defendant below, and not himself, as plaintiff, had the burden of proving that it disclosed that it was an agent for the United States and that respondent and his fellow civil-service crew members were employees of the United States (Br. 3). Because of this novel departure by respondent from his previous theory of the case, petitioner submits this reply for the convenience of the Court.

Discussion.

Respondent public administrator brought this suit to recover for the death of his intestate, a civil-service seaman of the United States employed on a vessel operated by the War Shipping Administration who was injured by the negligence of his fellow crew members in failing properly to connect a turnbuckle which formed part of the vessel's torpedo defense gear (Br. in op. 2). Petitioner answered, denying that it operated the vessel or employed the decedent (R. 3-4, paras. 3, 5; R. 6, para. 1). The only evidence of petitioner's relation to respondent or the vessel was that it was operated in accordance with the wartime standard form GAA 4-4-42 agency agreement considered by this Court in the *McAllister* case (R. 71, 318-334). The issue thus raised was submitted to a jury on a charge which instructed them that petitioner was under obligation to furnish the deceased government employee a safe place to work and safe appliances (R. 140) and would be liable if it negligently failed to do so (R. 143-144). Respondent specifically concedes that his intestate "lost his life through the negligence of fellow servants" (Br. in op. 2). The court below, affirming the judgment entered on the jury's verdict, ex-

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pressly held that petitioner could be held liable for the negligence of a fellow servant, "a mate who then knew, or should have known, that the turnbuckle was defective" (R. 345).

1. The heart of respondent's contention in this Court is that the proceedings of the two lower courts establish the equivalent of an employer-employee relationship between his intestate and petitioner, the Government's agent, and that therefore he may recover from petitioner for the negligence of the Government's civil-service crew members (Pet. 6). Respondent repeatedly asserts that petitioner failed to disclose that the United States and not itself was operator of the vessel and even declares that counsel stipulated that "petitioner operated the *SS. Francis Amasa Walker*" (Br. in op. 2, 3, 6).

Without regard to the fact that these supporting assertions by respondent are directly contrary to the record,* we submit that respondent lacks standing to press this contention for the first time in this Court. The district court charged the jury and the court below affirmed on the ground that petitioner was not a "ship's husband" but an "operating agent" (R. 346). The Court below affirmed on the authority of its decision in the *McAllister* case which this court has now reversed. Since it is elementary that a ship's husband is a mere shoreside functionary while an operating agent is owner *pro hac vice* of the vessel, both courts imposed liability on petitioner for failure to furnish a safe place to work (R. 140, 143-144). In fact, the court below

* It was stipulated "that the *Francis Amasa Walker* was operated under a general agency agreement in the standard form" (R. 71, 318-334)—not that the vessel was operated by petitioner as stated by respondent (Br. in op. 2). The answer denied (R. 6, para. 1) the allegations of the complaint that petitioner operated the vessel and employed decedent (R. 3-4, paras. 3, 5).

expressly found that the verdict was supported by evidence that the mate "then knew, or should have known that the turnbuckle was defective" and that his knowledge "is attributable as a matter of law" to petitioner (R. 345). Finally, respondent concedes that "neither in its brief nor in its argument before the Court of Appeals did respondent attempt to fasten liability on the petitioner for its failure to prove that it made disclosure of its principal and that matter was not considered by that Court" (Br. in op. 2).

We submit that respondent's attempt to sustain the judgment on a ground urged for the first time in this Court and not submitted to the jury nor considered by the lower courts must be rejected and the case remanded for further proceedings.

2. Respondent urges that the decisions of the lower courts are sustainable because "*petitioner* did not introduce the shipping articles in evidence; it offered no proof that it disclosed to respondent's intestate or other members of the crew that it was acting as an agent, that its principal was the United States and that the crew were employees of the United States" (Br. in op. 2). In support of this argument respondent cites the language of District Judge Knox in *Lewis* v. *U. S. Navigation Co.*, 57 F. Supp. 652, that "an agent who enters into a contract with another, and in his own name, without disclosure of the name of his principal, may be held for liability thereon" unless the agent proves that fact of agency was known to the plaintiff. Respondent concludes that petitioner failed to sustain this burden in the trial court and is therefore liable because of its failure to disclose.

Assuming respondent's standing to raise this question for the first time in this Court, the inapplicability of his

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argument to this case is apparent. There is no evidence that petitioner entered into any contract with the decedent without disclosing it was acting as agent for the United States. Unlike the situation presented by the record in the *Lewis* and other cases cited by respondent, where the plaintiffs' evidence established the defendant-agents had dealt with plaintiffs in the guise of principals operating the vessel for themselves, here the record shows only that petitioner was employed by the United States to attend to certain parts of the vessel's shoreside business and, as this Court recognized in *McAllister*, was denied any authority or control over the vessel itself and its civil-service crew members. Respondent, as plaintiff below, had the same burden of first introducing the shipping articles as had the plaintiffs in the cases on which he relies. If, as in those cases, the articles when offered in evidence failed to disclose that petitioner was acting not as operating owner on the voyage, but only as general agent for the United States, the burden of proving that some other adequate disclosure of petitioner's agency would have fallen on petitioner. On the present record, we submit, petitioner's status is fixed by the text of the GAA 4-4-42 agreement alone as only a ship's husband and accordingly the *McAllister* case is dispositive and requires a remand.

3. It is well settled that whoever is the operating owner for the voyage is liable for wages, maintenance, improper discharge, and all other obligations due the seamen and the statutes require the operating owner to be named in the articles (46 U. S. C. 564, 565, 713). But the seaman's statutory contract is with the master and if he is to recover from another, he has the burden of establishing that the party thus sought to be held liable was in fact the operat-

ing owner of the vessel for the voyage and not a time or voyage charterer or agent for a limited purpose, nor yet a general owner who has parted with the operation and control of his vessel to another who operates it as owner *pro hac vice*. *Everett* v. *United States*, 284 Fed. 203 (C. A. 9), certiorari denied, 261 U. S. 615; *The Del Norte*, 119 Fed. 118, 123 (C. A. 9); *The John E. Berwind*, 56 F. 2d 13 (C. A. 2); *Bacarat* v. *Andrew F. Mahoney Co.*, 1933 A. M. C. 1652, 1656 (N. D. Calif.); *Roberts* v. *United States S. B. Emergency Fleet Corp.*, 240 N. Y. 474, 477; *Cox* v. *Lykes Bros.*, 237 N. Y. 376. And in order that government seamen, like respondent's intestate, should be informed of their status beyond any possible doubt, WSA required that the shipping articles should be filled out to state, in the space for the name of the registered owner or operating company for the voyage, "United States of America, War Shipping Administration," and in the space for the address, "c/o XYZ Company, General Agent," giving the address of the agent (War Shipping Administration Operations Regulation No. 88 Revised). Moreover, all copies of the articles, including in particular that which is required by 46 U. S. C. 577 to be posted in the forecastle, are customarily imprinted with a rubber stamp advising members of the crew that they are not employees of the agents but exclusively employees of the United States through the War Shipping Administration.

Respondent's failure to introduce the shipping articles when he had an opportunity to do so speaks for itself. The shipping articles are a public document, certified copies of which are available to all on application to the Coast Guard. As respondent recognizes, they would have been dispositive here. We submit, therefore, that respondent has no standing with regard to the question he now seeks to raise, that

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the burden of introducing the shipping articles was on him alone, and that in the present state of the record the case can only be remanded to the district court for further proceedings. It was assumed in the District Court by the counsel for the respondent, by counsel for the petitioner and by the court that Francis Amasa Walker was operated under the same general agency agreement and in the same manner as was the *Mark Hammond in Hust* v. *Moore-McCormack Lines*, 328 U. S. 707.

Conclusion.

For the reasons stated in the petition and further explained herein a writ of certiorari should be granted. Moreover, the basic question in this case has recently been resolved by this Court contrary to the decision of the court below. Therefore, we believe that it would be appropriate for this Court to reverse the judgment of the Court of Appeals without further briefs or argument and to remand the case for further proceedings by the district court.

Arthur M. Boal,
Counsel for the Petitioner.